

Appellate Case No. B208439
Trial Court Case No. BS 106960

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CONCERNED RESIDENTS OF HANCOCK PARK, an unincorporated
California association; SUSANA FUNSTEN, an individual; LARRY FAIGIN, an
individual; and MICHAEL O'CONNELL, an individual

Petitioners and Appellants

vs.

CITY OF LOS ANGELES; LOS ANGELES CITY COUNCIL; LOS ANGELES
CENTRAL AREA PLANNING COMMISSION; LOS ANGELES CITY
PLANNING COMMISSION; ANIK CHARRON IN HER OFFICIAL
CAPACITY AS A LOS ANGELES ASSOCIATE ZONING ADMINISTRATOR

Respondents.

YAVNEH HEBREW ACADEMY, a California corporation

Real Party in Interest and Respondent

Appeal from the Superior Court for the County of Los Angeles
The Hon. Daniel S. Pratt and Thomas R. McNew

APPELLANTS' REPLY BRIEF

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I. THE ZA AND CAPC LACKED JURISDICTION.

A. The Jurisdictional Issue is Properly Before the Court.

Respondent City of Los Angeles and Real Party in Interest Yavneh Hebrew Academy (collectively "Respondents") make four jurisdictional arguments, none of which has any merit. In their brief, Respondents first argue (see Respondents' Brief ("RB") 8-9) that Petitioners did not raise the jurisdictional issue in the administrative proceedings. Even if that were factually true (it isn't), it would make no difference. Subject matter jurisdiction is non-waivable and may be raised for the first time in court. Mumaw v. City of Glendale (1969) 270 Cal.App.2d 454, 459. (See Appellants' Brief ("AB") 29-31.) Nor, as Respondents admit (RB 8; AB 31), is it subject to any exhaustion rule. City of Lodi v. Randtron (2004) 118 Cal.App.4th 337, 360.

Petitioner Susana Funsten raised the jurisdictional issue at the CAPC hearing. (See AB 29-30; 32 AR 6779.) But even if she did not, it means only that the case should be remanded to "the municipal agencies" to consider the jurisdictional issue. Mumaw, 270 Cal.App.2d at 461. Petitioners thus are in no way barred from asserting lack of jurisdiction.

Respondents' reliance on Resource Def. Fund v. Local Agency Formation Com. Of Santa Cruz County (1987) 191 Cal.App.3d 886 to support their argument is misplaced. In Resource Defense Fund, no one appeared at the city council hearing to raise the issue. Nor did the issue, failure to recirculate an environmental impact report after redrafting, go to the power of the City to act, as

subject matter jurisdiction does. Here, Petitioners appeared at the public hearing, raised the jurisdictional issue and that issue is non-waivable.

B. Yavneh's CUP Does Not Override the LAMC's Jurisdictional Provisions.

Respondents argue (RB 9-10) that Yavneh's CUP establishes the ZA's and CAPC's jurisdiction, despite LAMC §§ 12.24 U. and W. (See AB 25-28.)

Respondents cite no authority to support the critical element of their argument, *i.e.* that the CUP confers jurisdiction and overrides the LAMC. That is not surprising.

A city is bound by its ordinances. Tustin Heights Assn. v. Board of Supervisors (1959) 170 Cal.App.2d 619, 630. Inside a city, its ordinances have the force of state statutes. Irish v. Hahn (1929) 208 Cal. 339, 342. A city can override an ordinance only by enacting a proper amendment. Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 74, disapproved on other grounds by Bailey v. County of Los Angeles (1956) 46 Cal.2d 132.

LAMC Section 12.09.1.A prohibits all "conditional use" in an RD5 zone unless "approved pursuant to the provisions of [Section 12.24]." LAMC § 12.09.1.A and A.8. LAMC § 12.24.U provides: "The following uses and activities may be permitted...if approved by the City Planning Commission as the initial decision-maker and the City Council as the appellate body. ...24.

Schools:... (b) Private schools, elementary and high...." When the city amended § 12.24.U in 2001, it divested the ZA and the CAPC of jurisdiction to modify

school CUP's, and conferred that jurisdiction on the City Planning Commission ("CPC") and the City Council. LAMC § 12.24.U.(24), W.(9).

Respondents urge over and over that the expanded attendance at worship services for which Yavneh sought approval – and the even broader expansion of attendance and hours it received – were *school* uses. (E.g. RB 21-22, 25-26.) If Respondents are correct, they sought permits (via modification of the CUP) for "uses and activities" within the exclusive jurisdiction of the City Planning Commission. (If Respondents are wrong, they sought permits for church uses and were required to obtain a church CUP under LAMC § 12.24.W.) Respondents thus sought permits the ZA and CAPC had no jurisdiction to issue. That the ZA purported to modify the CUP after July 2001 (RB 10) makes no difference. Acts taken without jurisdiction do not confer jurisdiction.

If the CUP trumps § 12.24.U, the City would have two parallel tracks for setting policy and regulating school uses in residential neighborhoods. The ZA and the CAPC would have jurisdiction over existing school CUP's. The CPC and the City Council would regulate new ones. Two independent decision-making processes would virtually guarantee inconsistent results and conflicting policy decisions. That would frustrate express City policy. See LAMC § 12.01 ("The purpose of this article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan....")

C. LAMC Section 12.24.M. Does Not Confer Jurisdiction on the ZA and CAPC.

In their brief (AB 28-29), Petitioners demonstrate that § 12.24. M. does not confer jurisdiction on the ZA and CAPC for two distinct reasons: (1) § 12.24 M. does not confer jurisdiction; and (2) Yavneh's use is not a "deemed-approved use" under § 12.24. L. and thus is not within the scope of subsection M.

Respondents ignore Petitioners' arguments, thereby impliedly conceding that Petitioners are right. Respondents assert (RB 11) that jurisdiction exists under subsection M. because "the modifications [permitted by CAPC] only modestly extend the School's use...." Modest extension, however, is irrelevant to subsection M jurisdiction. So is the Respondent's erroneous reliance on and citation to subsection M. (RB 12.) To qualify for jurisdiction under subsection M., Yavneh's use must be a "deemed-approved conditional use" under subsection L.¹ As Petitioners have shown, it is not. (See AB 28-29.) Respondents make no argument that it is a deemed-approved use. The ZA and CAPC therefore had no jurisdiction under § 12.24.M.

¹ A "deemed approved use" is a use that was at one time lawful *without* a conditional use permit, but would now require a conditional use permit because of a change in the zoning of the lot. LAMC § 12.24.L.

D. LAMC Sections 12.24. U. and W. Govern the ZA's and CAPC's Jurisdiction.

Respondents' fourth argument (RB 9) is that § 12.24.U does not apply because it does not mention modifications to existing CUPs. By its clear terms, however, § 12.24.U confers jurisdiction over *all* conditional school uses and activities on the Planning Commission and the City Council.² It does not limit their jurisdiction to "new" as opposed to "modified" uses and activities. As shown above, any such distinction would divide the City's decision-making and lead to inconsistent results. The jurisdiction of the Planning Commission and the City Council thus does not turn on whether the uses and activities are new or existing.

Finally, even if 12.24.U were limited to "new" uses and activities, Yavneh applied for and was granted the right to conduct *new* uses and activities on the premises. Specifically, Yavneh sought City permission to expand attendance at its religious services to new groups. This was a new and expanded use or activity. (33 AR 6852.) Yavneh *got* even more, *i.e.* attendance not limited to any groups (subject to a 300-person cap) and extended Friday and Saturday hours. Both the expanded attendance and extended hours were new uses or activities.

Respondents' last claim (RB 13) is that if the ZA has original jurisdiction, CAPC has appellate jurisdiction. While this is true as far as it goes, as shown

² Subsection U. provides in relevant part: "The following uses and activities may be permitted in any zone...if approved by the City Planning Commission as the initial decision-maker or the City Council as the appellate body."

above, the ZA did not have original jurisdiction. Therefore neither the ZA nor CAPC had jurisdiction to review and issue a CUP. Petitioners therefore are entitled to a writ of mandate because CAPC acted in excess of its jurisdiction.

II. PETITIONERS DID NOT RECEIVE A FAIR HEARING BEFORE THE CAPC.

A. The Requirement to Consider the Record on Appeal Does Not Make The Notice Adequate.

Respondents argue (RB 14-16) that the notice of the hearing on Yavneh's appeal was adequate because LAMC Section 12.24.I.3 and the hearing notice provided that the CAPC could consider the "entire action" (RB 15) on appeal. Respondents take the statute and the notice provisions out of context. LAMC Section 12.24.I.3 states that the "appellate body shall make its decision based on the record, *as to whether the initial decision-maker erred or abused his or her discretion.*" (Emphasis added.) The scope of CAPC's review thus is limited to determining whether the ZA committed error or abuse of discretion. It is not *carte blanche* to make a judgment based on any other criteria.³ Section 12.24.I.3's requirement that the appellate body review the "entire record" to find error or abuse thus does not save the notice in this case.

³ As shown in Section III below, CAPC exercised a purely appellate jurisdiction and had no power to make findings *except* to the extent it found error or abuse by the ZA. Significantly, CAPC found neither.

The court in Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 556 – 57 rejected an argument similar to Respondents'. In Cohan, the respondents argued that because the council could review a decision of the planning commission de novo, the notice of the hearing did not have to have any statement of the actual grounds for the appeal. Id. Thus, respondents contended, the petitioner was on notice that the item listed on the city council agenda as granting oak tree permits for his newly approved development project was actually an appeal of the planning commission's approval of the project. Id. The court reasoned that such an interpretation of de novo review would render the city's ordinance requiring that the "notice of appeal contain a statement of grounds" meaningless. Id.

Adequate notice is "[n]otice of the charges sufficient to provide a reasonable opportunity to respond...." Rosenblit v. Super. Ct. (Fountain Valley Regional Hospital and Medical Center) (1991) 231 Cal.App.3d 1434, 1445.

Adequate notice should take the "guesswork out of the proceedings by setting forth" the charges or issues that will be addressed. Id. at 1446. Thus, adequate notice requires more than just a reference to the case being appealed or a general reference to hours or uses. It requires a sufficient description of the basis for the appeal such that the responding party can prepare a specific response. Id.

Here, the notice only referred to *Yavneh's* appeal from the restrictions on Saturday prayer sessions and the prohibition on religious services in the ZA's August 14, 2006 determination. (21 AR 4282.) *Yavneh* sought "*reinstatement of*

[its] right for prayer services on Saturday morning” and “clarification that the right to pray includes the ability to allow members of the Yavneh community of students, family, teachers, faculty, donors, alumni and invited guests.” (21 AR 4184.) (Emphasis added.)

The notice said nothing about the issues CAPC actually addressed, which were *expanded* hours for Friday and Saturday worship services and elimination of the prohibition on religious services. As in Cohan, the statutory requirement that the appellate body review the entire record does not make the notice adequate.

B. The ZA’s “Recommendation” to Grant the Appeal Was In Effect a Revised Determination.

Petitioners agree that the ZA had no jurisdiction to revise her determination after Yavneh appealed. (RB 16.) But that only shows how egregiously CAPC erred. CAPC adopted the ZA’s “changes” as its decision *without any finding of error or abuse of discretion in the ZA’s original determination*. The ZA’s revised determination (even though, by Respondents’ admission, a legal nullity) had the effect of a revised determination of which Petitioners had no notice. (23 AR 4521.) Nor were Petitioners provided with her revised position prior to the hearing even though she prepared a document stating her newly found support for the appeal and presented this to the CAPC. (23 AR 4521.)

Documentary evidence provided to an administrative panel must also be made available to the parties. See Rosenblit 231 Cal.App.3d at 1446-47 (denying the petitioner access to documentary evidence available to the administrative body

reviewing his case violated principles of fair procedure). Here, as in Rosenblit, Petitioners had no notice of the specific issues (i.e. extended hours, elimination of the prohibition on religious services) that would be discussed on appeal. They did not have access to all of the evidence provided to the reviewing body. (23 AR 4521.)

C. Petitioners Had No Opportunity to Address the Findings and Issues Actually Under Consideration by the CAPC.

Respondents make the classically Kafkaesque argument (RB 17-18) that CAPC's conduct of the hearing did not prejudice Petitioners. This is the height of nonsense. The reality of the October 24, 2006 hearing was that *Petitioners* were the appellants. In the upside-down world of that hearing, Petitioners bore the burden of overturning the ZA's "revised" non-decision that CAPC treated as the ZA's action under review. (23 AR 4521.)

If CAPC had given Petitioners timely and truthful notice of what they really faced, Petitioners could have briefed the RLUIPA and jurisdictional issues, marshaled environmental evidence and presented testimony on noise and other disruptions caused by imposing a church use on a historic residential neighborhood. See Rosenblit 231 Cal.App.3d at 1447 ("It is impossible to speculate what defense he might have been able to offer if" appellant had been given access to the information forming the basis for the charges against him.)

III. CAPC'S FINDINGS DO NOT SUPPORT THE DECISION.

A. CAPC's Finding That Public Religious Services Were Illegal At Yavneh Contradicts Its Decision To Allow Such Services.

In their brief Respondents ignore the stark contradiction between CAPC's definition of an illegal on-campus religious service and its decision to allow such services. CAPC repeatedly stated that religious services open to the general public "would constitute a change of use...to that of a house of worship, as currently not permitted." (E.g. 33 AR 6856, 6853.) CAPC's decision, however, eliminated all restrictions on the groups allowed to attend on-campus services. (See 33 AR 6843.) CAPC thus opened Yavneh's services to the general public. Attendance is limited to 300 people (33 AR 6833), but any member of the public may attend.⁴ CAPC's finding that religious services open to the public are "not permitted" thus is directly contrary to its decision to allow those very services.

B. CAPC Lacked Jurisdiction To Make Findings Except To The Extent It Found Error Or Abuse Of Discretion By The ZA.

In arguing that the findings support CAPC's decision, Respondents incorrectly assume CAPC had the power to make findings (and oral findings in particular (RB 19-20)) as an initial decision-maker. CAPC, however, had only the powers conferred on it by the LAMC. See City and County of San Francisco v.

⁴ As the ZA found, a cap was not enforceable, especially given Yavneh's "history of abuse" of Condition 26. (19 AR 3896.) CAPC found no error or abuse of discretion in this finding.

Padilla (1972) 23 Cal.App.3d 388, 399-400 (zoning review board could not exercise ZA's powers to make original decision). Under the LAMC § 12.24.W. the ZA, not CAPC, was the initial decision-maker.⁵ Under LAMC § 12.24 I.3., CAPC's review was limited to whether the ZA "erred or abused his or her discretion." CAPC exercised a purely *appellate* jurisdiction. Id.; Mumaw, 270 Cal.App.2d at 460.

CAPC therefore had no jurisdiction to make original findings or to reverse the ZA's findings except for error or abuse of discretion. CAPC found *no* such error or abuse. CAPC therefore had no grounds to reverse or modify the ZA's findings.⁶ It lacked jurisdiction to make any original findings of its own. The relevant findings thus are those of the ZA in her August 14, 2006 determination.

C. CAPC's Purported "Findings" Were Either Irrelevant Or Were Conclusions Of Law Entitled To No Deference.

Respondents argue that the findings support the decision because CAPC found that (1) Yavneh had substantially complied with its CUP; and (2) "the CUP modifications were consistent with a religious school use." (RB 21, 18-22.)

⁵ Section 12.24.W. provides that the uses or activities within the ZA's jurisdiction may be permitted "if approved by the Zoning Administrator as the initial decision-maker or the Area Planning Commission as the appellate body." Petitioners assume here that the ZA had jurisdiction over Yavneh's request to modify its CUP.

⁶ CAPC nonetheless arbitrarily omitted some of the ZA's findings and modified others. (See AB 16-17.) Absent the necessary findings or error or abuse by the ZA, these acts by CAPC are void.

Finding (1), however, is irrelevant. Most of the CUP's 38 conditions, which include such matters as tree wells (no. 18) and air filtration (no. 29), have nothing to do with the CAPC's decision. The issue is not overall compliance with the 38 conditions. It is whether the findings support CAPC's decision to extend Yavneh's Friday and Saturday hours and eliminate the attendance restrictions at religious services. (33 AR 6833, 6843.)

Alleged finding (2), while worded to suggest a finding of fact, is actually a conclusion of *law* that Yavneh's on-campus religious services constitute a school use under the LAMC, not a use that requires a church CUP.⁷ The deference accorded to administrative interpretations of law is based on the agency's assumed "special familiarity" with its ordinances. MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal.App.4th 204, 219.

Here, CAPC's President Kim made very clear that CAPC was "not the proper body" and lacked "expertise" to distinguish between "school activities and what house of worship activities are." (32 AR 6701, 6696.) Despite Respondents' claims to the contrary (e.g. RB 27), any purported determination by CAPC that Yavneh's worship services were a school use thus was *outside* CAPC's expertise. It is entitled to no deference.

⁷ As noted above, if Yavneh requested expanded *school* uses, it was required to present its request to the City Planning Commission. LAMC § 12.24.U.

Despite its claimed inability to draw the legal distinction between school and church uses, CAPC of course did just that. As shown above, CAPC drew the line based on whether Yavneh's religious services were open to the public. CAPC then issued a decision that permits those very services.

D. CAPC and the ZA Found, and Yavneh Admitted, That It Conducts Congregational Worship Services on Its Campus.

Respondents try to dismiss Petitioners' arguments (see AB 41-46) on the inadequacy of the findings as unsubstantiated. (RB 21-22, 27-29.) The findings are not contradicted, however, that Yavneh was conducting congregational worship services on campus without a permit. Even in their brief, Respondents admit Yavneh conducts "Sabbath prayer services" on campus. (RB 24.)

Respondents argue the services are legal because they are not open to the public.

In The League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052, 1054, 1056 (9th Cir. 2007) ("LRNA"), the Ninth Circuit held that under the LAMC "congregational worship" services are a "conditional use" that in a residential zone requires a church CUP. The court held the settlement agreement at issue in that case void because it "grant[ed] the Congregation permission to engage in a 'conditional use' as defined by the [LAMC] that is forbidden in the absence of a valid CUP." Id. at 1056.

Respondents try to distinguish LRNA on the grounds that (1) the congregation did not dispute that it engaged in a church use; and (2) the court did not address the distinction between a church use and a school use. (RB 21-22.)

As to (1), Respondents ignore LRNA's rationale. The congregation argued that the settlement agreement was valid because it was not the equivalent of a CUP.

The court rejected this argument on the grounds that the LAMC required a CUP for *any conditional use*. The issue therefore was whether "the Congregation "could engage in the *uses* permitted by the Settlement Agreement," *i.e.* holding congregational worship services, "without first obtaining a CUP." *Id.* at 1056. (Emphasis added.) The issue here likewise is whether Yavneh can hold congregational worship services without the church CUP required for that use.

As to point (2), LRNA explicitly addressed the use necessary to require a CUP for a house of worship. That use was conducting congregational worship services. That *other* uses may occur on the property, whether a residential use allowed as of right or operation of a school under a school CUP, is irrelevant. Were that not so, a school CUP would allow the occupant to engage in multiple conditional uses, each of which requires a separate CUP.

Respondents admit that the LAMC's chapter on zoning does not define the term "church." Definitions of a religious institution on the context of adult entertainment advertising (LAMC § 12.70(B)(10), tobacco advertising (§ 45.19.5), display of drug paraphernalia (§ 45.21(D)) and public safety (§ 57.02.02) have nothing to do with the type of activity that requires a church CUP. (RB 25.) LRNA, however, dealt directly with that issue. The best authority on the requirement for a church CUP thus is LRNA's holding that a CUP is required to conduct congregational worship services on Saturdays and holidays.

Respondents cite various portions of the record as purported findings that Yavneh is a school and not a church. (RB 26-27.) Respondents' argument is that Sabbath congregational worship services are part of the school's academic curriculum. If weekend worship services were part of the religious curriculum, every religious school would automatically qualify as a church. The LAMC, however, requires separate CUP's for school and church uses. The City must follow its own ordinances. Tustin Heights, 170 Cal.App.2d at 630.

Respondents also distort the record. The reference at 20 AR 4070 that the school "is not a house of worship open to the general public" (RB 26) is not a finding about Yavneh's activities, but about the requirements of Condition 26c.⁸

In her August 14, 2006 determination, the ZA rejected as "quite disingenuous" Yavneh's argument that "services were always permitted on the site." She stated this was the reason she deleted the word "services" from the uses allowed under Condition 26b. Services of the type Yavneh was conducting thus were *not* allowed on campus. (19 AR 3895.) CAPC found neither error nor abuse of discretion in this finding and thus had no grounds to reverse it.

Respondents' reference to 20 AR 4061 (RB 26) is similarly taken out of context. There CAPC addressed the frequency of plan review and stated: "The plan review shall give special attention to the strict compliance of the use of the property for a school and school activities and not as a place of worship open to

⁸ Condition 26c. provides: "The property shall not be used for weddings, bar/bat mitzvahs, adult education programs or by outside groups."

the general public.” CAPC thus did not “find” that Yavneh was not operating a place of worship. It said review would focus on compliance with a school use.

The relevant factual issue therefore is whether Yavneh was conducting congregational worship services on its campus. Both CAPC and the ZA found that Yavneh was doing so. For example, CAPC found that “Saturday services” were being conducted at Yavneh, in addition to minion services weekday mornings and Friday nights. (33 AR 6852-6853.) The ZA found that Yavneh was violating the CUP by operating a “multipurpose religious community center....” (19 AR 3895.) Yavneh repeatedly admitted that it conducts congregational worship services on campus. (E.g. 18 AR 3701; 32 AR 6573.) The findings thus show that the services CAPC’s decision permits violate the LAMC.

Respondents seek to frame the discussion of whether Yavneh must have a CUP for a church use in terms of whether Yavneh is “primarily” a school. (RB 29-30.) Their approach is to ask how much religious activity is needed before a religious school ceases to be a school and becomes a house of worship. Such an inquiry is abstract and meaningless. The “primary use” approach to CUP requirements would also allow multiple other conditional uses as long as the “primary use” remained that of a school. In their opening brief (AB 46), Appellants set forth this contention. Respondents attempt to ignore the argument for the obvious reason that they have no answer.

From a land-use standpoint, the only viable approach is to ask whether Yavneh is engaged in activity that requires a church CUP – regardless of what else

Yavneh does on the property and regardless of whether any other use requires its own CUP. LRNA squarely holds that conducting congregational worship services triggers the requirement for a church CUP. That holding is applicable here.

Not even Respondents deny that they conduct congregational worship services on campus on Saturdays and holidays when the school is closed. (E.g. 33 AR 6852-6853, 32 AR 6573-6574.) Their argument is that Yavneh does not need a church CUP because its services are not open to the public at large. As shown below, factually that is not true, but under LRNA it is irrelevant.

The notion that congregational worship services do not require a church CUP simply because they are not open to the general public makes no sense. If 300 worshipers appear at Yavneh they are a congregation, whether or not they belong to certain groups. If every Saturday they hold a religious service of the type normally conducted in a house of worship, they should be required to have a church CUP.

CAPC's distinction between a limited congregation and one that theoretically includes the general public thus is meaningless. In any event, as shown above CAPC's decision removed any limitations on the groups allowed to attend Yavneh's worship services and thus opened those services to the public.

In sum, both CAPC and the ZA found that CAPC's decision purports to allow Yavneh to conduct unpermitted congregational worship services. The findings thus do not support CAPC's decision.

E. CAPC and the ZA Found That Yavneh's Services Are Open To the Public.

CAPC admitted that if Yavneh's services were open to the general public, Yavneh would be operating a house of worship, not a school. (33 AR 6856.) Both CAPC and the ZA found that Yavneh's services were open to anyone who wished to attend – and thus to the general public. The ZA found that Yavneh was operating a “multipurpose religious community center” in violation of the CUP conditions. (19 AR 3895.) Although CAPC inserted “alleged” before the word “violation,” (33 AR 6853), it found no error or abuse of discretion by the ZA, who did *not* use the word “alleged.” The ZA's finding thus stands.

After summarizing extensive oral and written “allegations” that Yavneh was operating “a house of worship open to the general public,” both CAPC and the ZA found those allegations to be true. In the very next sentence both stated: “Saturday services do not seem to be the only violation of conditions....” In other words, Yavneh was violating the conditions, both by holding Saturday public worship services described in the allegations and otherwise. By CAPC's own logic, holding public worship services transformed Yavneh's school into a house of worship, which requires a separate CUP. (33 AR 6853, 6856.)

Respondents seek to dismiss these findings as mere false “allegations.” (RB 21, 27.) Both CAPC's and the ZA's discussions, however, make clear that they accepted the “allegations” as *true* and found that Yavneh was conducting services open to the general public. (19 AR 3894; 33 AR 6852.)

Respondents argue (RB 27-29) that substantial evidence supports CAPC's purported finding that Yavneh did not operate a church open to the general public. Respondents attack the evidence Petitioners cite at AB 49-52. Respondents, however, attack the wrong part of Petitioners' brief. Petitioners' point at pages 49-52 is that Yavneh conducts congregational worship services prohibited without a CUP under LRNA, not that the services are open to the public. Respondents do not deny that Yavneh conducts congregational worship services when the school is closed.

Petitioners discussed CAPC's and the ZA's findings that Yavneh's services were open to the public (and thus a church use by CAPC's own reasoning) and the supporting evidence in Section IV.A.2. of their brief at pages 41-49, some of which is discussed above. Petitioners, however, cite the headmaster's April 2003 letter (32 AR 6852) expressing a desire not to turn away any would-be worshipers. Petitioners also cite the ZA's finding that Yavneh was operating a "multipurpose religious community center." This evidence and findings clearly show that Yavneh's services are open to the general public. Respondents make no argument to the contrary.

F. CAPC's Purported "Oral Findings" Do Not Support the Decision.

Respondents argue that CAPC made oral findings that (1) the school was not a house of worship; and (2) removing the restrictions on attendance at services was consistent with "Yavneh's educational needs," i.e. a school use. (RB 20.) As

discussed above, CAPC exercised an exclusively appellate jurisdiction and had no jurisdiction to make findings except to the extent it found error or abuse by the ZA. See LAMC § 12.24 I.3. It found neither. Respondents' arguments, moreover, are based on a misreading of the record.

Respondents cite out of context (RB 20) the statements of Commissioner Martorell that Yavneh is a religious school with religious services integrated with the school. (32 AR 6702.) Mr. Martorell made this comment in the context of CAPC President Kim's repeated statements that CAPC could not draw a distinction between school and church uses. (32 AR 6696, 6701.)

Like Commissioner Kim, Commissioner Martorell articulated the importance of the school-church distinction. (33 AR 6702.) Apparently agreeing with Commissioner Kim, Mr. Martorell asked whether the LAMC defined where a religious school ended and a house of worship began (32 AR 6698)⁹ and whether Yavneh considered itself to be operating a house of worship. (32 AR 6701-6702.) He said that the CUP was for a school. He added that if Yavneh operated "like a house of worship" it would need a CUP for that use. (See 32 AR 6702.)

Respondents' claim that CAPC orally "found" that the Yavneh school was not a house of worship thus is incorrect. The transcript reflects the struggle between the commissioners' correct understanding of the need to draw a distinction between school and church uses and their erroneous belief that CAPC

⁹ Mr. Martorell thus seems to have adopted the erroneous "primary use" theory.

could not draw the distinction. Mr. Martorell's comments actually show confusion over the legal issue of what a house of worship is. Even if he had authority to do so, he did not "find" that Yavneh was not operating a house of worship.

Respondents claim that CAPC stated lifting the restrictions on Sabbath worship services was "consistent with the School's educational needs...." (RB 20.) In support, Respondents vaguely cite 33 AR 6696-6702. The dominant theme of this part of the transcript, however, is CAPC's belief that it lacked the ability to distinguish between school and church uses. The record thus provides no support for Respondents' claim.

G. CAPC's Written Findings Do Not Support the Decision.

Respondents claim (RB 20) that CAPC found that modifying the CUP was proper to allow Yavneh the same uses permitted for other schools. Respondents cite 19 AR 4070-4071 (33 AR 6853-6854), where CAPC briefly mentions other schools. But nowhere does CAPC find that any other school is allowed to conduct congregational worship services on campus under a school CUP. The findings Respondents cite thus do not support CAPC's decision allowing such services without a permit.

IV. THE EVIDENCE DOES NOT SUPPORT CAPC'S DECISION.

Respondents argue that the evidence supports the conclusion that Yavneh substantially complied with the CUP as a whole. (RB 23-24.) As shown above,

however, compliance with the CUP as a whole is not the issue. No one is seeking outright revocation of Yavneh's CUP.

When Yavneh addresses the issue of whether its religious services were open to the public (RB 24), it cites only its attorney's argument that services are open to various groups, including "members of the community, the immediate residential community," including some who "walk a distance" to get there. (32 AR 6573-6574.) Counsel's statement actually shows that the services are open to the general public. Anyone who wishes to do so may attend. The evidence thus does not support CAPC's decision.

V. RLUIPA DOES NOT SUPPORT CAPC'S DECISION.

In their brief, Petitioners show that the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA") does not support CAPC's or the trial court's decision. Specifically, Petitioners show that (1) the ZA and CAPC based their decision on RLUIPA, but (2) neither the administrative bodies nor the trial court found any violation of RLUIPA; and (3) RLUIPA does not justify Yavneh's failure to obtain a CUP for its synagogue use. (AB 52-54.)

Respondents deny that CAPC or the trial court based their decisions on RLUIPA. (RB 42-44.) Respondents ignore the ZA's admission that her revised decision was based on consultations with the City Attorney concerning "federal legislation[] concerning the regulation of religious activities" enacted after issuance of the original 1998 CUP. (32 AR 6567.)

Respondents ignore that they based their appeal in large part on RLUIPA (21 AR 4180-4182) and that their attorney argued RLUIPA at the October 24, 2006 CAPC hearing. (32 AR 6572, 6575.) In its statement of decision (2 AA 0328), the trial court said that “[r]emoving that condition [26b.] addressed that concern [about RLUIPA].” Respondents’ claim that CAPC and the trial court relied solely on non-RLUIPA “land use” considerations thus is wrong.

Respondents’ argument that CAPC and the trial court did not base their decisions on RLUIPA (RB 42, 44) implicitly admits that neither made any findings of an RLUIPA violation. Absent such findings, however, RLUIPA cannot support CAPC’s or the trial court’s decisions. LRNA, 498 F.3d at 1058 (RLUIPA could not override state and local laws unless the court found RLUIPA violation). For this reason alone, RLUIPA provides no basis for the judgment.

Respondents argue nonetheless that CAPC and the trial court could have based their decisions on RLUIPA, citing Westchester Day School v. Village of Marmaronek (2nd Cir. 2007) 504 F.3d 338. In that case, the court held that the city’s denial of a special permit to expand a religious school’s existing facilities violated RLUIPA. Westchester is inapplicable here. First, in Westchester, the school applied for the right kind of permit, *i.e.* a special permit to expand. *Id.* at 345. Here, the core issue is Yavneh’s refusal even to apply for a church CUP, even though it engages in a church use. LRNA, 498 F.3d at 1056.

Second, in regard to the “substantial burden” aspect of RLUIPA, Westchester recognized that rejection of a submitted plan is unlikely to impose a

substantial burden “if there is a reasonable opportunity for the institution to submit a modified application....” Id. at 349. Here, in response to the ZA’s August 14, 2006 determination restricting Saturday hours and prohibiting religious “services,” Yavneh could have applied for a church CUP. Again, the root of this litigation is Yavneh’s insistence that it may operate a house of worship under a school CUP.

Third, the Westchester court reasoned that no substantial burden is imposed where the religious institution has a ready alternative available. It reasoned that even if the city definitively rejected the school’s expansion plan, if the school could rearrange its existing facilities to meet its religious needs, the burden would not be substantial.

Here, Yavneh has numerous alternative locations for its Saturday and other after-hours worship services on La Brea Avenue, Beverly and Wilshire Boulevards and other streets zoned for church use. (32 AR 6119-6122; 23 AR 4545-4546.) Even if some or all of the Yavneh congregation would have to walk farther to reach a location on one of these streets (the distance from Yavneh to La Brea is a half-mile or less), that would not impose a substantial burden on the congregation. Midrash Sephardi, Inc. v. Town of Surfside (11th Cir. 2004) 366 F.3d 1214, 1227-1228 (“[T]he burden of walking a few extra blocks ... is not “substantial” within the meaning of RLUIPA.”)

Fourth, the Westchester court recognized that “generally applicable burdens, neutrally imposed, are not ‘substantial.’” Id. at 350. To require that Yavneh obtain a CUP for a house of worship in order to operate a house of

worship imposes a burden applicable to every entity that wishes to operate a house of worship. Westchester and RLUIPA thus provide no support for the judgment.

VI. CAPC'S DECISION VIOLATES CEQA.

A. Yavneh's House of Worship is a Project Subject to CEQA.

A project under CEQA (AB 55) is “an activity which may cause either a direct physical change in the environment, or reasonably foreseeable indirect change....” Public Resources Code § 21065. (Emphasis added.) Respondents argue (RB 41) that no evidence shows that the CUP modifications “will cause” environmental effects. The issue, however, is whether the activity *may* have environmental effects. The Court of Appeal has recognized that church uses in single-family neighborhoods have the potential for environmental effects including noise, traffic and crowds. Corporation of Presiding Bishop, Etc. v. City of Porterville (1949) 90 Cal.App.2d 656, 659-660.

Respondents ignore that the very application of CEQA exemptions (16 AR 3329), which Yavneh sought here, presupposes that Yavneh's activity is a project under CEQA. (AB 55.) CAPC's decision allowed a house of worship to operate at Yavneh. The impacts of such a use are sufficient to require conditional-use approvals. LAMC § 12.24 W.9. Yavneh's house of worship in historic Hancock Park thus is a project under CEQA.

B. The City Deprived Petitioners of a Fair Hearing on CEQA.

Respondents assail Petitioners (RB 31-32, 37-41) for not raising CEQA and failing to make an adequate factual record at the CAPC hearing. Respondents thus

seek to take advantage of the City's wrongful act in depriving Petitioners of a fair hearing. Of course Petitioners were unable to make anything like the factual showing on CEQA they would have made if CAPC had given them a fair hearing. See Rosenblit 231 Cal.App.3d at 1447 ("It is impossible to speculate what defense he might have been able to offer if" appellant had received adequate notice and a fair hearing.)

Had Petitioners been given fair notice, they would have been able to show the potential adverse environmental effects of a church use in historic Hancock Park. But the City lied to Petitioners. It told them the agenda items were Yavneh's appeal from the restrictions on Saturday hours and the elimination of "religious services" at the school. (32 AR 6553.) Yavneh sought to reinstate the former status quo. (21 AR 4184.) The City said nothing about extending Yavneh's hours or expanding its uses. The City added – in all capital letters: "STAFF RECOMMENDS DENIAL OF THE APPEAL." (Id.) As Petitioners have shown (AB 33-39), all of this was false.

The City and Yavneh now lambaste Petitioners for noncompliance with procedural requirements that presuppose a fair hearing. Kafka could hardly have done better himself.

C. CAPC Improperly Applied the Categorical Exemption.

Respondents admit (RB 30-31) that all CAPC did in regard to a categorical exemption was to adopt the Notice of Exemption ("NOE") of January 15, 2004. The problem for Respondents – which they of course ignore in their brief – is that

this exemption was only for changes in CUP conditions 32 and 33 (16 AR 3329).

These conditions dealt with reporting and compliance review. (15 AR 3159.)

They had nothing to do with extended hours or Saturday religious services.

Significantly, CAPC did not find any CEQA exemption applicable to those uses.

Respondents argue (RB 34-35) that the City did not have to decide that exceptions to the categorical exemptions were inapplicable. A finding of a categorical exemption, they say, implies that no exceptions apply. The exemption finding here, however, relates solely to changes in Yavneh's reporting requirements. Such an exemption cannot "imply" that extending Yavneh's weekend hours and allowing Sabbath services are exempt. Nor can it imply that such a phantom "exemption" is not subject to any exceptions.

Respondents argue that neither the LAMC nor CEQA requires findings of an exemption determination. (RB 33-34.) But at a minimum, the City was required to make findings that the project CAPC approved (extended hours and the synagogue use) was exempt. LAMC § 12.24 E. requires that the ZA find that the proposed use will be, among other things, "desirable to the public convenience and welfare" and not "materially detrimental to the character of development in the immediate neighborhood." These criteria encompass findings that at least provide notice that the ZA has found the project exempt under CEQA. Otherwise, the exemption process would be completely hidden from any scrutiny.

Even if written findings were not required, CEQA required the City to *decide* that the extended hours and synagogue use were categorically exempt.

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Cal.App.4th 1168, 1186. Assuming the ZA had jurisdiction, LAMC § 12.24 W. required the ZA to make that decision initially (even if without supporting findings) and limited CAPC to review for error or abuse of discretion. The ZA never decided that the extended hours and synagogue use were exempt. CAPC and the trial court thus had nothing to review. CAPC's decision therefore violated CEQA.

Respondents argue (RB 31) that the trial court was authorized "in the absence of prejudice" to find additional exemptions on its own, even if the ZA and CAPC had not done so. They rely on Cal. Farm Bureau Federation v. Cal. Wildlife Conservation Board (2006) 143 Cal.App.4th 173, 190-191. In that case, the Court of Appeal issued a writ overturning the agency's finding that a project (the state's conversion of agricultural land to wildlife habitat) was subject to exemptions, including categorical exemptions. The court reasoned that the project must be considered as a whole for purposes of exemptions. Id. at 191.

Here, the only categorical exemption relates to a small part of the overall Yavneh operation. The exemption finding is unrelated to the uses CAPC's decision permitted. Obviously Petitioners were prejudiced by CAPC's decision. They had no opportunity to present evidence of environmental effects.

Finally, Respondents argue at length (RB 35-41) that substantial evidence supports the categorical exemptions. As usual, they try to dismiss Petitioners' evidence and legal citations. The Court need not wade through Respondents'

discussion. The record below was fatally defective. Respondents never made any showing that the extended hours and expanded uses CAPC allowed were exempt from CEQA. Petitioners never got a chance to present a rebuttal. There was nothing to rebut. CAPC's decision thus cannot stand. See Hollywoodland, 161 Cal.App.4th at 1186. That one might parse the record of a fatally flawed proceeding for "substantial evidence" or argue that Petitioners' evidence is insufficient does cure this defect.

VII. CONCLUSION

As shown in Petitioner's Opening Brief and above, CAPC lacked jurisdiction, denied Petitioners a fair trial and abused its discretion in issuing its April 24, 2007 determination. This Court should therefore reverse the judgment below and remand with directions that the trial court remand the case to the City Planning Commission for further proceedings consistent with this Court's opinion.

Date: April 24, 2009

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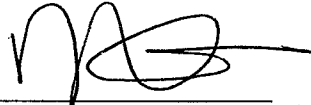
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Date: April 24, 2009

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PROOF OF SERVICE

Section 1013A (3)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2121 Avenue of the Stars, Suite 2800, Los Angeles, California 90067.

On April 24, 2009, I served the foregoing document described as **APPELLANTS' REPLY BRIEF**, on interested parties as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on April 24, 2009 at Los Angeles, California.


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